13

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 156.

OTIS G. FREEMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

ALDIS B. BROWNE,
W. A. KINCAID,
ALEX. BRITTON,
EVANS BROWNE,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 156.

OTIS G. FREEMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

1. The judgment under review plainly imposes (1) imprisonment for the public offense of one year and nine months, and (2) imprisonment for seven additional months, dependent wholly upon the default in payment to the creditor of the sum of money therein named. Clearly the original term of imprisonment is absolute and represents the required expiration for the *public* offense.

2. The subsidiary imprisonment is not "in lieu" of default in payment of any fine or of the costs. It is related only to the amount of money which the judgment requires shall be restored to the creditor. It is imposed for the latter's benefit and solely to coerce such payment. Hence we submit the cases cited on the opposing brief (pp. 6-12) are not applicable.

Those cases involve imprisonment for failure to pay a *fine* or to give security against bastard children becoming a public charge, etc. The case of *People vs. Cotton,* 14 Ill., 414, 415, on the recitals of the brief, fell within the exception to the State statute forbidding imprisonment for debt. *Moore vs. Green* (73 N. C., 394, 397) in terms based the right of arrest and imprisonment upon the ground of public right. But it is plain that the case treated the offense as *single* against the State and to be satisfied by single punishment, whereas here the absolute sentence for the offense against the public is imprisonment for one year and nine months, and the added term is for the benefit of the creditors as such, and for them *alone.*

II.

The contention that the subsidiary imprisonment inflicted here is for a fine or for costs is answered from the record and the plain reading of the judgment.

The cases cited under this head on the opposing brief (pp. 15-22) relate to punishment for malfeasance in office—such as the wrongful appropriation of public moneys—(an offense directly against the State), or omission to pay taxes, or in the plain nature of a penalty or a fine to be recovered for the benefit of the State, or of a fine for contempt of court on the part of an attorney. All such cases are plainly distinguishable from the case at bar. They involve *one* penalty or fine and one punishment, while here the judgment and sentence plainly distinguish between the public

and private wrong and inflict the separate terms of imprisonment accordingly. The case of *Harris vs. Bridges* 57 Ga., 407) rests upon the State statute of replevin, which required return of the property or security for its forthcoming, and in default of both, commitment of the defendant, as the decision states, "until the personal property shall be produced, or until he shall enter into bond, with good security, for the eventual condemnation money." Manifestly, that is not "debt" in any view.

Here the punishment of imprisonment for the public offense is separately provided and in absolute form, while the subsidiary imprisonment is inflicted to compel payment of the money demand based on the judgment entered therefor. It is plain that such subsidiary punishment is a substitute for the injury caused, to wit, the failure to repay the money awarded the creditor by the judgment. It can be nothing else. The words, "or in lieu thereof" (payment) "to suffer subsidiary imprisonment," can have no other meaning. As payment would secure release, then imprisonment for the full term of seven months would be "in lieu" or discharge of the obligation incurred.

Respectfully submitted,

ALDIS B. BROWNE,
W. A. KINCAID,
ALEXANDER BRITTON,
EVANS BROWNE,
Attorneys for Plaintiff in Error.

14

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 156.

OTIS G. FREEMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR PLAINTIFF IN ERROR.

ALDIS B. BROWNE,
W. A. KINCAID,
ALEX. BRITTON,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 156.

OTIS G. FREEMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

Plaintiff in error was accused, tried, and convicted in the Court of First Instance, city of Manila, of the crime of estafa, arising from alleged misappropriation of some 3,500 pesos received by him as manager of the steamship department of Castle Bros., Wolf and Sons, and for which it was charged he has failed to account (R., 1). He was arrested and arraigned upon information or complaint attested by the prosecuting witness, and tried without a jury, the sentence of the court after review of the evidence being (R., 14):

"The court therefore finds the defendant Otis G. " Freeman, guilty of embezzlement of the sum of " P3,500 Philippines currency, as charged in the " complaint, the property of Castle Bros. Wolf and " Sons, and does sentence him to imprisonment— " presidio correctional, in the insular prison of Bili- " bid, for the period of one year and nine months, " and to restore to said Castle Bros. Wolf and Sons, " the sum of P3,500 Philippines currency, or in lieu " thereof to suffer subsidiary imprisonment for the " period of seven months and to pay the costs of " prosecution."

On appeal the Supreme Court of the Islands reviewed the evidence and found the sum alleged to have been so embezzled to be P2,078.50, adding (R., 27):

"This finding of course, will, in no way estop the " said firm of Castle Bros. Wolf and Sons from re- " covering in a civil action from the defendant any " sum or sums in excess of this amount which are " found to be due to the said firm. The only charge " (change) which this finding makes in the conclu- " sion of the lower court is in the amount of money " which must be returned to the firm of Castle Bros. " Wolf and Sons by virtue of this sentence.

" It is the judgment of this court that the sentence " of the lower court be affirmed with this modifica- " tion, and that the defendant be sentenced to be " imprisoned for a period of one year and nine " months of presidio correctional, and to restore to " Castle Bros. Wolf and Sons the sum of P2,078.50 " or in lieu thereof to suffer subsidiary imprisonment " for a period not to exceed one-third of the principal " penalty, and to pay the costs."

The judgment was so entered (R., 30). Therefrom this writ of error is prosecuted.

Assignment of Errors.

A number of errors are assigned (R., 32, 33). Those which relate to the findings or rulings of the court upon questions of fact are not reviewable here, and hence the testimony is omitted by stipulation in the printing of the record in this court (R., 41). The errors assigned, reviewable here, are (R., 33):

VIII.

The court erred in refusing to dismiss this cause without prejudice to the right to institute a civil action for the rendition of accounts.

IX.

The court erred in affirming the judgment of the Court of First Instance and the sentencing of the accused to one year and nine months of presidio correctional and to repay to Castle Brothers, Wolf and Sons the sum of 2,087.50, or otherwise to suffer subsidiary imprisonment for a period not to exceed a third part of the principal penalty and to pay the costs.

XI.

The court erred and violated the constitutional law of the Philippines (the act of Congress of July 1, 1902) in sentencing the accused in this case to suffer subsidiary imprisonment, which sentence is in effect that of imprisonment for debt.

I.

The judgment and sentence was erroneous because in effect imprisonment for debt.

(Assignments IX and XI.)

The act of July 1, 1902, entitled "An act temporarily to " provide for the administration of the affairs of civil gov- " ernment in the Philippine Islands, and for other purposes" (ch. 1369, 31 Stats., 691), provides, in section 5, *inter alia:*

> *"That no person shall be imprisoned for debt."*

This affirmative declaration stands in harmony with the Federal law effective upon the mainland, for, by section 990, U. S. Revised Statutes, it is provided that—

> " No person shall be imprisoned for debt in any " State, on process issuing from a court of the United " States, where, by the laws of such State, imprison- " ment for debt has been or shall be abolished."

We are well aware that by the current of authority prohibition of imprisonment for debt is restricted to claims or demands arising *ex contractu*. But such decisions have been rendered in American courts of common-law tradition and practice, wherein the mixture of penal prosecution for an offense and money judgment for the creditor in one action is unknown.

Here, by the very terms of the judgment entered in both the trial court and in the Supreme Court of the Philippines, money judgment is rendered in favor of the creditor and payment required on pain of *additional* imprisonment if such payment be omitted. The money judgment is in no sense a *fine* whereof any portion goes into the public treasury. It is purely and only a recovery for the benefit of the creditor, and he may sue in another and wholly civil action

for any balance claimed by him and not embraced in the former judgment. The only theory on which such money judgment can be so entered is that of debtor and creditor—the withholding by the former of money lawfully due the latter, which is the very essence of debt under any system of laws. The demand of the creditor does not lie in tort or trespass. It is debt pure and simple, and is so treated in the judgments below and most clearly stamped with that character alone by the language of the judgment of the Supreme Court of the Philippines here under review.

It is hence, we submit, within the clear effect of the principle ruled in the leading case of *Carr vs. State* (106 Ala., 35), wherein the defendant was indicted under a State law making it a misdemeanor for a person engaged in banking to receive a deposit when insolvent, and punishing him with a fine of not less than double the amount of the deposit, one-half of which shall go to the depositor, and that payment to him before conviction shall be a defense to prosecution.

On demurrer the court ruled:

> "1. The statute, it is insisted for the appellant, is "violative of article 1, section 21, of the constitution "of the State, which provides 'that no person shall "'be imprisoned for debt.' It is to be observed in "the outset that this provision of the organic law "is essentially different from the provisions on this "subject in many other State constitutions, in that "it contains no exception of 'cases of fraud,' and, on "the same line, is essentially different from the con-"stitutions of this State of 1819, 1861 and 1865, "in each of which the language is that 'the person "'of a debtor, where there is not strong presumption "'of fraud, shall not be detained in prison, after de-"'livering up his estate for the benefit of his cred-"'itors, in such manner as shall be prescribed by "'law.' Const. 1819, art. 1, sec. 18; const. 1861, "art. 1, sec. 18; const. 1865, art. 1, sec. 22. This "change was made in the constitution of 1868 (art. "1, sec. 22), where the provision assumed its present

"form. In *Ex parte Hardy*, 68 Ala., 303, 318, it "was held—and we do not understand that there "was any division of opinion on this point—that the "elimination of the exception as to frauds was a "pregnant omission, which left the guaranty of im- "munity from imprisonment to the debtor to apply "to all cases of debt, whether they involved fraud or "not. So that the statute we are considering can "derive no aid from the idea that the receipt of a "deposit by a banker under the circumstances stated "is a fraud, and hence that, the transaction would "constitute 'a case of fraud,' since even in such cases "there can be no imprisonment for debt.

"2. The 'imprisonment for debt' which the fram- "ers of constitutions embodying this provision "doubtless had most prominently in mind was im- "prisonment upon process issuing in civil actions the "object and sole purpose of which were the collection "of debts. It was to remove the evils incident to the "system of taking the debtor's person upon a *capias* "*ad satisfaciendum* that the organic inhibition came "primarily to be ordained. But the effect of its ordi- "nation has been to establish a public policy much "broader in its influence upon legislation and opera- "tion upon judicial proceedings than would have "sufficed for the eradication of the ills which at- "tended upon the recovery, or attempted recovery, "of debts by restraint of the debtor's person. This "policy is inimical alike to the incarceration of a "debtor as a means of coercing payment, and to his "punishment by imprisonment for a failure to pay, "at least when such failure results from inability. "And hence it is that, while neither the letter of the "inhibition, nor the broader policy which is engen- "dered by it and has come to be a part of it, has "any application to criminal judgments for fines "and costs, yet it is not within legislative competency "to declare the mere non-performance of a contract "of indebtedness a misdemeanor, and punish the "commission thereof by imprisonment, directly or "indirectly; for, as said in the notes to *State vs.* "*Brewer* (S. C.), 37 Am. St. Rep., 753, 758, 'as that "'which is prohibited to be done directly cannot be

" 'accomplished by indirection, the legislature cannot
" 'declare the mere non-performance of a contract to
" 'be a misdemeanor, for that would amount to an
" 'attempt to legalize imprisonment for debt.' And
" so, in Tennessee, there was a statute which made
" it unlawful for any person, firm, corporation, etc.,
" to refuse to cash any checks or scrip issued by them
" if presented to them within thirty days of the date
" of issuance, and declared that any such person, etc.,
" so refusing to cash in lawful money such checks
" or scrip would be guilty of a misdemeanor, and,
" upon conviction, should be fined not less than $10.,
" nor more than $25. The constitutional provision
" in that State is that 'the legislature shall pass no
" 'law authorizing imprisonment for debt in civil
" 'cases'—terms which would seem to allow greater
" latitude of legislation in respect of cases of the class
" we are considering than our own provision—and,
" bringing the statute to the test of this inhibition,
" the court said: 'The act of the legislature in ques-
" 'tion, while not directly authorizing imprisonment
" 'for debt, does attempt to create a crime for the
" 'non-payment of debts evidenced by checks, scrip,
" 'or order, and for such crime provides a penalty,
" 'which may or may not be followed by imprison-
" 'ment. In that way and for that reason the act is
" 'violative of the spirit if not the letter of the con-
" 'stitutional provision above cited. It is in direct
" 'imposition of imprisonment for the non-payment
" 'of debt, and is therefore clearly within the consti-
" 'tutional inhibition.' *State vs. Paint Rock Coal &*
" *C. Co.*, 92 Tenn., 81. And this principle of apply-
" ing the policy of the organic law on this subject
" to cases which may not be strictly within its letter
" has received recent recognition by this court. *Ex*
" *parte Russellville*, 95 Ala., 19.

" The statute involved in the case at bar is a much
" more flagrant attempt to authorize imprisonment
" for debt, in our opinion, than that denounced by
" the Supreme Court of Tennessee. It was not the
" avowed purpose of that act to enforce the payment
" of a debt by means of a prosecution under it. This
" one cannot be read without conviction that its pur-

"pose is to impose imprisonment for debt and "to coerce the payment of the debt by the "duress it authorizes. Its requirement that the fine "shall be paid only in money, that it shall be double "the amount of the deposit, and that one-half of "it—that is, a sum equal to the amount deposited—"shall go to the person who made the deposit, tends, "at least, to show that coercion of payment of the "debt which the depositary owed the depositor—for "the transaction created the relation of debtor and "creditor between them—by means of the restraint "which the imposition of the fine itself immediately "put upon the defendant, not to speak here of his "imprisonment preliminary to the trial, and, that "failing to enforce payment, by means of imprison-"ment at hard labor for the payment of the fine and "costs, was the moving purpose and efficient cause "of the enactment of the statute. And what doubts "on this point might have been left, had the statute "stopped here, are removed beyond peradventure by "its further provision that payment to the depositor "at any time before conviction 'shall be a good and "'lawful defense to any prosecution under this act.' "There cannot be two opinions as to the intent and "meaning, or the effect upon the whole enactment, "of this last and most remarkable provision. It is "a declaration of the baldest and most direct char-"acter to one party to a transaction, whereby he has "incurred a debt to the other, in the name of the "State, that, unless he pays that debt, he shall be "arrested, held to trial, tried, convicted, fined, and "imprisoned at hard labor, and this obviously not for "any taint of criminality in the transaction out of "which the debt arose, but purely and simply for "the non-payment of the debt. For this default, "and until it is purged either by simply paying the "debt and accrued costs before conviction or by work-"ing out double the debt and the costs, the debtor "may be imprisoned for an indefinite time before "trial, merely and only because he does not pay the "debt and the expenses of putting this coercion upon "him, there being no pretense even of ultimately "punishing him for taking the deposit, if the pre-

"liminary imprisonment shall have the desired effect "of extorting the money he owes the depositor out "of him; and if, as is the case here, the compulsion "of preliminary imprisonment fails of its intended "effect, he may, under the guise of punishing an "act which was not criminal before this statute, and "which upon the statutory definition does not neces- "sarily involve abstract criminality or the taint of "moral turpitude, and which might up to the very "moment of conviction have been shorn of even its "factitious criminality by the payment of a debt, "be held to hard labor until his services at the statu- "tory rate shall yield the amount of the debt, and "for an equally long time to work out a like sum "imposed upon him as an additional penalty for his "failure to pay the debt before conviction. There "can, in our opinion, be no sort of doubt that this "enactment is violative of the constitutional pro- "vision, and therefore void. The trial court erred "in overruling the demurrers which went to this "point, and the motion in arrest of judgment based "upon them. Its judgment will be reversed, and a "judgment will be here entered discharging the de- "fendant."

That the money judgment thus rendered in this case for the benefit of the creditor is in no sense a *fine* is demonstrated by the provision of article 49 of the Philippine Penal Code, which reads thus:

"ART. 49. In case the [illegible]rty of the person pun- "ished should not be sufficient to cover all the pecu- "niary liabilities, they shall be satisfied in the follow- "ing order:

"1. Reparation of the injury caused and indemni- "fication of damages.

"2. Indemnification to the State for the amount "of stamped paper and other expenses which may "have been incurred on his account in the cause.

"3. The costs of the private accuser.

"4. Other costs of procedure, including those of "the defense of the person prosecuted, without prefer- "ence among the persons interested.

"5. The fine.

"Should the crime have been of those which can "be prosecuted only at the instance of a party, the "costs of the private accuser shall be satisfied in "preference to the indemnification to the State."

In *U. S. vs. Hutchins,* 5 Phil., 343, it was held (syllabus):

"A subsidiary imprisonment for non-payment of "a fine imposed under Acts Nos. 610 and 652 of the "Philippine Commission cannot be inflicted."

The same rule was reaffirmed in

U. S. vs. Lineses, 5 Phil., 631.
U. S. vs. Glefonce, 5 Phil., 570.
U. S. vs. Cortes, 7 Phil., 149.

In *U. S. vs. Macasaet,* 11 Phil., 447, 449, it was held that Act No. 732 of the Philippine Commission, effective November 1, 1907, does include subsidiary imprisonment for violation of acts of the Commission *"until the fine is paid."* Hence it is plain that the Philippine Commission distinguishes, as we here contend, by imposing such subsidiary imprisonment only where a *fine* is involved. It hence results that, even in the Philippine Islands, subsidiary imprisonment for debt is, in effect, sought to be enforced under the provisions of the Philippine Penal Code, while the legislative acts of the Philippine Commission recognize the prohibition against imprisonment for debt, as forbidden by the organic act of 1902, *supra.*

In many of the States, by constitution or statute, the prohibition against imprisonment for debt is limited by the words "except in cases of fraud," or other equivalent expression. But in the Philippine Act, *supra,* this exception is not found. And while, of course, it is well settled that fines, as such, are not within the prohibition against imprisonment for debt, it is plain that a judgment in favor of the creditor, for money due from the debtor, and hence

wrongfully withheld, is, in fact and law, a judgment for debt. The test is made absolute by the action of the Supreme Court of the Philippines in expressly declaring that the judgment now entered against the plaintiff in error, in favor of the creditor, "would in no way estop the said firm " of Castle Bros., Wolf & Son, from recovering in a civil " action from the defendant, any sum or sums in excess of " this amount, *which are found to be due to the said firm*" (R., 27). Certainly, under any such further action, and resulting judgment thereon, imprisonment for non-payment could not be imposed. As certainly the obligation from the plaintiff in error to these creditors to return any money due them is not divisible, whereby the judgment here entered may be enforced by imprisonment, and the further judgment hereafter entered in another action cannot be.

II.

" The court erred in refusing to dismiss this cause " without prejudice to the right to institute a civil " action for the rendition of accounts."

(Assignment VIII.)

The contradictory decisions below amply sustain this contention. In the trial court, upon review of the evidence, judgment was rendered against plaintiff in error and in favor of complainants for P3,500, and "subsidiary imprisonment" for seven months inflicted for its non-payment (R., 14). In the Supreme Court of the Islands, and upon the same evidence, the judgment was reduced to P2078.50, and on failure to pay same to the creditor the plaintiff in error was condemned " to suffer subsidiary imprisonment for a " period not to exceed one-third of the principal penalty" (R., 27).

"In lieu thereof," means "instead of" (Century Dictionary, *Lieu*), or in satisfaction or place of. Yet the same court by

its decision *supra* declares that neither such payment in money or by "subsidiary imprisonment" would bar the creditor from a civil action to recover any sum he may therein prove to be due in *excess* of the judgment rendered in this action and upon the *same* demand. In other words, imprisonment will satisfy (and therefore discharge) the judgment here rendered, leaving another and wholly civil action open to the complainants to recover any *additional* sum arising out of the same cause of action. The novelty of this result is certainly surprising to practitioners in courts of common-law tradition. It forcibly illustrates the result of combining the civil law expressed in code form and procedure with American law, procedure and judgments. With all respect it is submitted that the attempt to thus adjust fundamental differences is simply to invade the orbit of the former by the wholly variant system of the latter, with resulting collision and discord. In the American system punishment is by the State and for the public benefit alone, to sustain the offended dignity of the State, arising from the infraction of its penal laws, while in the Philippines, under a common sovereignty and flag, the procedure here involved plainly *reverses* that fundamental principle and affords substantive relief to the complainant by rendering money judgment in his favor and "in lieu" of payment imposes *additional* imprisonment in satisfaction of the complainant's money demand, but without prejudice to his right to sue in a purely civil action to recover more, although arising out of the same transaction. Under such conditions *here* former recovery is a plea in bar, while *there* a partial accounting may be had in a mixed penal and civil action, but without prejudice to a further demand in a civil suit.

It would seem perfectly plain, therefore, that in any court sitting under the American flag the distinction between civil and criminal actions must be recognized and maintained. In the case at bar the alleged offense against public justice, *per se* is one thing, and the civil demand of private parties

another and wholly independent thing. Embezzlement is an offense against the State, and its punishment is in vindication of the dignity and laws of the State. Debt *inter partes* is a wholly different thing, for which the law affords abundant remedy in a civil action. It is not correct to say that restitution to the injured party may, under the American system, be made part of the judgment and sentence imposed as punishment for a public offense. Restitution is also the basis and purpose of all civil remedies.

When, then, money judgment is sought by the injured party, and the proceeding abides *his* initiative, it is plain his full remedy lies in a civil action for its enforcement. Otherwise the penal laws would stand solely for enforcement at the pleasure of the private litigants. But we submit as fundamental that nowhere within the territorial sovereignty of the United States should it be rightfully maintained that enforcement or non-enforcement of the penal law rests only in the choice of the creditor. The individual subject to prosecution and punishment for such violation, is an offender against *public* law. The offense and resulting punishment is in the hands of the State alone and subject only to its control. To hold otherwise, is to wholly exclude the State and make paramount and exclusive the privilege and demand of the creditor. In effect it substitutes private interest and private motive for the superior and exclusive interest of the State. Such result is, we submit, in fundamental conflict with those principles of American Government which should control everywhere under the flag. It is impossible to recognize any statute existing anywhere which stands in such flat contradiction to this vital principle of American jurisprudence. The conflict is too plain to require extended comment. Hence we submit the procedure here invoked, and the remedy sought to be applied thereunder in favor of the creditor, demonstrates the contention here made that the court below erred in refusing to dismiss this cause without prejudice to the right of the creditor to in-

stitute a civil action for the rendition of accounts. The plaintiff in error is a citizen of the United States. Surely he is entitled to the equal protection of the laws wherever his alleged offense may have been committed within the territorial jurisdiction of the National Government. That is not a constitutional guaranty alone. It needs no written declaration for its existence. It exists in civilized government everywhere. It is extended in express words to the Philippines by the organic act of 1902, section 5 (31 Stats., p. 692).

We submit the judgment should be reversed.

ALDIS B. BROWNE,
W. A. KINCAID,
ALEX. BRITTON,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

OTIS G. FREEMAN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 156.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Plaintiff in error was charged with embezzling, while an employee of Castle Brothers, Wolf & Sons, ₱3,500 the property of said company (Rec., 1). On the trial the Court of First Instance found him guilty, and pronounced the following judgment:

> The court therefore finds the defendant, Otis G. Freeman, guilty of embezzlement of the sum of ₱3,500 Philippine currency, as charged in the complaint, the property of Castle Brothers, Wolf & Sons, and does sentence him to imprisonment—*presidio correccional*—in the insular prison of Bilibid for t e period of one year and nine months, and to

> restore to said Castle Brothers, Wolf & Sons the sum of ₱3,500 Philippine currency, or in lieu thereof to suffer subsidiary imprisonment for the period of seven months, and to pay the costs of prosecution. (Rec., 14.)

On appeal, the Supreme Court of the Philippine Islands, after reviewing the evidence, summed up its finding of facts and pronounced judgment in the following language:

> We are of the opinion, and so hold, that the evidence shows, beyond peradventure of doubt, that the defendant did receive the sum of ₱2,078.50, while acting as employee of the firm of Castle Brothers, Wolf & Sons, with the obligation to return the same to said firm. This finding, of course, will in no way estop the said firm of Castle Brothers, Wolf & Sons from recovering in a civil action from the defendant any sum or sums in excess of this amount which are found to be due to the said firm. The only change which this finding makes in the conclusion of the lower court is in the amount of money which must be returned to the firm of Castle Brothers, Wolf & Sons by virtue of this sentence.
>
> It is the judgment of this court that the sentence of the lower court be affirmed with this modification, and that the defendant be sentenced to be imprisoned for a period of one year and nine months of *presidio correccional*, and to restore to Castle Brothers, Wolf & Sons the sum of ₱2,078.50, or in lieu thereof to suffer subsidiary imprisonment for a period not to exceed one-third of the principal penalty, and to pay the costs. (Rec. 27.)

The sixth clause of section 5 of the act of July 1, 1902, known as the Philippine bill of rights (ch. 1369, 32 Stat., 692), provides that no person "shall be imprisoned for debt." The following are the laws of the Philippine Islands under which plaintiff in error was prosecuted and the sentence was imposed:

(1) Philippine Penal Code, article 535:

The following shall incur the penalties of the preceding articles:

* * * * *

5. Those who, to the prejudice of another, shall appropriate or misapply any money, goods, or any kind of personal property which they may have received as a deposit on commission for administration or in any other character producing the obligation to deliver or return the same, or who shall deny having received it.

(2) Philippine Penal Code, article 534:

A person who shall defraud another in the substance, quantity, or quality of things he may deliver to him, by virtue of an obligation, shall be punished—

* * * * *

2. With that (the penalty) of *arresto mayor* in its medium degree to *presidio correccional* in its minimum degree if it should exceed 250 pesetas and not be more than 6,250 pesetas.

(3) Philippine Penal Code, article 28:

* * * * *

Those [penalties] of *presidio correccional* and *prision correccional* shall last from six months and one day to six years.

* * * * *

That of arresto mayor shall last from one month and one day to six months.

(4) Philippine Penal Code, article 49:

In case the property of the person punished should not be sufficient to cover all the pecuniary liabilities, they shall be satisfied in the following order:

1. Reparation of the injury caused and indemnification of damages.

2. Indemnification to the state for the amount of stamped paper and other expenses which may have been incurred on his account in the cause.

3. The costs of the private accuser.

4. Other costs of procedure, including those of the defense of the person prosecuted, without preference among the persons interested.

5. The fine.

Should the crime have been of those which can be prosecuted only at the instance of a party, the costs of the private accuser shall be satisfied in preference to the indemnification to the state.

(5) Philippine Penal Code, article 50:

If the person sentenced should not have property to satisfy the pecuniary liabilities included in Nos. 1, 3, and 5 of the preceding article, he shall be subject to a subsidiary personal liability at the rate of one day for every 12½ pesetas, according to the following rule:

1. If the principal penalty imposed is to be undergone by the criminal confined in a penal institution, he shall continue therein, although said detention can not exceed one-

third of the term of the sentence, and in no case can it exceed one year.

* * * * *

(6) Philippine Penal Code, article 52:

The personal liability which the criminal may have incurred by reason of insolvency shall not exempt him from the reparation of the injury caused and indemnification of damages if his pecuniary circumstances should improve; but it *shall* exempt him from the other pecuniary liabilities included in Nos. 3 and 5 of article 49.

Counsel for plaintiff in error insist (1) that the judgment and sentence that plaintiff in error suffer subsidiary imprisonment was erroneous, because in effect it is an imprisonment for debt; and (2) that the cause should have been dismissed without prejudice to the right to institute a civil action for the rendition of accounts.

These contentions will be considered in the order mentioned.

ARGUMENT.

I.

The sentence of subsidiary imprisonment for a period not to exceed one-third the principal penalty of one year and nine months presidio correccional, in lieu of the restoration to Castle Bros., Wolf & Sons, the sum of ₱2,078.50, is not in conflict with that provision in the Philippine bill of rights which prohibits imprisonment for debt.

The conflict between the judgment pronounced by the court and the Bill of Rights, contended for by

plaintiff in error, does not exist for the following reasons:

First. *The prohibition is against imprisonment for debt due by contract, and not for a liability arising out of the embezzlement of money.*

This view is supported by the following authorities, in which the reasons for such an interpretation of similar provisions are given:

In the matter of petition of Wheeler (34 Kans., 96) the petitioner had been imprisoned under a bastardy act which directed how the judgment of the court for the support of the child should be enforced, and, among other things, provided that the judgment should specify the terms of payment and should require the defendant, if he were in custody, to secure the payment of the judgment by good and sufficient sureties, or in default thereof, be committed to jail until such security should be given. In determining whether said act was in violation of the constitutional provision that no person "shall be imprisoned for debt, except in cases of fraud," the court said:

> It is urged on behalf of the petitioner that this and other sections of the act that provide for commitment to the county jail come within the prohibition of the constitution above quoted. We think not. There are many forms of liability that do not constitute a debt in the technical and legal sense of that term. Imprisonment for debt as here used has a well-defined meaning, and as has been repeatedly decided, applies only to liabilities arising upon contracts. (*McCool* v. *The State*,

23 Ind., 129; *Ex rel. Brennan* v. *Cotton*, 14 Ill., 414; *Lower* v. *Wallick*, 25 Ind., 68; *Dixon* v. *State*, 2 Tex., 481; *Musser* v. *Stewart*, 21 Ohio St., 353; *Hawes* v. *Cooksey*, 13 Ohio, 242; *Moore* v. *Green*, 73 N. C., 394; *Ex parte Cottrell*, 13 Nebr., 193.)

> The charge of maintenance and education, while it is in the nature of a civil obligation and imposed in a proceeding which is essentially civil, though criminal in form, is not based upon contract either express or implied. It is the duty of the father to make provision for the support of his illegitimate offspring. To compel him to assist in the maintenance of the fruit of his immoral act, and to indemnify the public against the burden of supporting the child, is the purpose of the proceeding in bastardy.

In *Musser* v. *Stewart* (21 Ohio St., 353) it was held that a statute which authorized the imprisonment of a defendant for nonpayment of a judgment in a bastardy case was not in contravention of a clause in the Constitution which provided that "No person shall be imprisoned for debt in a civil action * * * unless in cases of fraud." The court, among other things, said:

> This is not a suit to recover a sum of money owing from the defendant to the complaining party. The liability sought to be enforced is not founded upon contract express or implied, but originates in the wrongful act of the defendant against the consequences of which the statute is designed to protect the public.

It was not determined whether the action was civil or criminal, but the decision was apparently made to rest upon the fact that the liability was not a debt within the meaning of the Constitution, and, further, because the statute was in the nature of a police regulation.

In *People* v. *Cotton* (14 Ill., 414, 415) a judgment had been rendered against the petitioner, Brennan, for trespass upon personal property, for which an execution was issued and returned "no property found." The plaintiff then made oath that the relator was able to pay the judgment, but fraudulently withheld the money; and thereupon the justice issued a capias upon which the relator was arrested and committed to the common jail until he should satisfy the judgment and costs. The constitution contained the provision that "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud." The Supreme Court held that—

> This prohibition applies only to actions upon contracts, express or implied. It does not extend to actions for torts. The design is to relieve debtors from imprisonment who are unable to perform their engagements.

In *Moore* v. *Green* (73 N. C., 394, 397) it appeared that under a statute existing in that State the defendant was sued in a civil action for libel, and was at the same time taken into custody under a warrant of

arrest. The constitution contained a clause providing that "there shall be no imprisonment for debt in this State, except in cases of fraud," and it was insisted that the proceedings were in violation of this provision. The court overruled this contention, holding that such liability was not a debt within the meaning of that term in the constitution; and, among other things, said:

> Undoubtedly, for some purpose, it is (a debt). An action of debt may be maintained on it (the claim for damages), and a *fi. fa.* may issue on it. But to construe the above-cited clause of the bill of rights as forbidding imprisonment for any cause of action which by judgment would become a debt, would make its prohibition extend to all cases, as every cause of action becomes a debt in one sense when a judgment is recovered on it. Chitty, in his standard book on Pleading, divides all actions into two great classes; those which arise *ex contractu*, and those which arise *ex delicto*. No doubt the framers of the constitution had this familiar classification in mind, and in forbidding imprisonment for debt, they referred rather to the cause of action as being *ex contractu*, than to the form it would assume upon a judgment. If they had meant to forbid imprisonment in every civil action, they would have said so. But by forbidding it for *debt*, they plainly imply that it may be allowed in actions which are not for debt. In forbidding imprisonment for debt, as popularly understood, viz, for

36645—10—2

> a cause of action arising *ex contractu*, they responded to the general public sentiment, but I know of no writer on the reform of law who has recommended the abolition of punishment for trespassers and wrongdoers. Such a provision might be humane to the injuring, but it would not be so to the injured, parties. It would withdraw from the State its power to impose a wholesome check on violence and wrong, and would tend to license disorders and lawbreakings incompatible with the peace and welfare of society.

In *McCool* v. *The State* (23 Ind., 127, 131) the plaintiff had been prosecuted for retailing intoxicating liquors without a license, and upon conviction it had been adjudged that he pay a fine of $5 and costs and stand committed to jail until the fine and costs were paid.

It was insisted that the costs were a matter of debt within the meaning of the clause of the constitution which provided that "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted; and there shall be no imprisonment for debt, except in case of fraud."

The court remarked that it was not aware that it had ever been claimed that the first clause of this section extended to liabilities other than those growing out of contracts, either express or implied, citing a statute which showed that the legislature had, in

effect, placed that interpretation upon the clause, and then the court proceeded:

> The second clause of the section prohibiting imprisonment for debt, except in case of fraud, connected as it is with the first clause by the copulative conjunction, would seem to relate to the same subject or class of liabilities, and if so, the immunity contemplated by the second clause would be confined to debts or liabilities growing out of contracts, and not to liabilities resulting from crimes or torts.

The court further held that:

> The costs were but an incident of the fine assessed, resulting from the same act, and that although they are due to the officers of the court and witnesses for services rendered in the course of the prosecution, they are adjudged against the defendant because of his criminal act, and may be fairly regarded as a part of the punishment.

The phrase "any debt or liability" in the first clause would certainly admit of a broader interpretation than the word "debt" in the second clause, and if the first had been uniformly restricted to liability created by contract, it followed as a matter of course that the latter should be so restricted.

In *Charleston* v. *Oliver* (16 S. Car., 47, 51, 52) it was insisted that an ordinance of the city of Charleston that provided that the city court might give judgment for the amount of a license tax and penalty, or imprisonment for thirty days, in case of nonpayment, was in violation of a clause of the state constitution

which provided that "No person shall be imprisoned for debt, except in cases of fraud." The court overruled this contention, holding that the word "debt," as used in the constitution, had to be taken in its ordinary sense, and that it did not embrace taxes levied for the support of the government or any of its agencies.

Second. *The imprisonment in lieu of the payment of ₱2,078.50 to Castle Brothers, Wolf & Sons, is imposed for the criminal offense of converting their property to plaintiff in error's own use, and is not, therefore, an imprisonment for debt.*

The validity of the laws of the Philippine Islands which authorize the imposition of subsidiary imprisonment when the offender fails to restore the funds converted is not here in question, except in so far as they authorize this particular judgment. It is the judgment and not the law that is here challenged. It is conceded that the judgment falls within the scope of the laws in force in the Philippine Islands when ceded to the United States; but if there were any ground to question such fact, it would be a matter exclusively for the Philippine courts. But those laws may be looked to to determine the character of this judgment, and the real basis upon which it rests.

By article 50 of the penal code, which is above quoted in the statement of facts, it is provided that, if the person sentenced should not have property sufficient to satisfy the pecuniary liabilities included

in Nos. 1, 2, and 3 of article 49, he shall be subject to subsidiary personal liability of one day for every 12½ pesetas; and if the principal penalty is to be undergone by the criminal in a penal institution, he shall continue therein, the detention not to exceed one-third of the principal term, and in no case to exceed one year. The liabilities mentioned in Nos. 1, 3, and 5 of article 49 are (1) reparation of the injury caused and indemnification of damages; (3) the costs of the private accuser, and (5) the fine.

By article 52 it is provided that the personal liability which is incurred by reason of insolvency shall not exempt the criminal from the reparation of the injury caused and indemnification of damages if his pecuniary circumstances shall improve, but it shall exempt him from the payment of the costs of the private accuser and the fine.

As will appear from the authorities hereinafter cited, the costs of a criminal prosecution and the fine imposed therein are not debts within the meaning of the inhibitions of imprisonment for debt, which are found in all or many of the state constitutions; and, therefore, imprisonment which is inflicted as a substitute for the payment of fine and costs is not unlawful. It was in accordance with article 52 that the court, in its judgment, incidentally remarked that—

> this finding (that Freeman had converted ₱2,078.50 instead of ₱3,500 as found by the Court of First Instance) of course will in no way estop the said firm of Castle Brothers, Wolf & Sons from recovering in a civil action

> from the defendant any sum or sums in excess of this amount which are found to be due to the said firm.

That is, it was recognized that the finding of the amount in this case was in no sense an adjudication which could be binding in a civil action, but that such finding *was only for the purpose of fixing the punishment for the crime committed.*

The imprisonment, therefore, is not a substitute for the reparation for injury caused. The liability of the criminal for the payment of the funds converted is not extinguished, or in the least affected, and while it is recited in the judgment that the additional imprisonment shall be in lieu of a restoration of the ₱2,078.50 converted, yet the judgment must be read in the light of the Philippine laws, and the phrase "in lieu of" can not mean "in satisfaction or place of," as contended for by counsel for plaintiff in error.

While, then, one object of judgments for subsidiary imprisonment rendered under the statutes quoted is to secure the return of the money converted, and while the imprisonment may be avoided by its repayment, *yet the debt itself does not form the basis of the judgment, but the sentence in fact rests upon the crime committed in the conversion. In the absence of the unlawful and felonious conversion, no sentence, either principal or subsidiary, could be pronounced; and the subsidiary sentence finds its root in the crime just as much as does the principal sentence.*

The abolishment of imprisonment for debt was never intended to apply to a judgment which inci-

dentally requires the return of stolen or embezzled property, even though a measure of relief is given to the criminal in case the property is returned or paid for. The liability contemplated was one of a civil character alone, and not one growing out of a *criminal* act. For the *crime*, any punishment which is not cruel or unusual may be inflicted by the courts when authorized to do so by proper legislation; and if, as a part of the punishment, the criminal be required to return money stolen or embezzled, or to make reparation for an injury caused by the crime, or to suffer additional imprisonment in case the money is not returned or reparation made, either of the alternative punishments is suffered in consequence of, and for, the *criminal offense*, and the imprisonment, if it be the punishment actually inflicted, is not for debt.

This view is fully sustained by the following authorities:

In *Smith* v. *McLendon* (59 Georgia, 523, 527) a rule *nisi* was granted against an attorney at the instance of a client, calling upon him to show cause why he should not pay over certain money which he had collected for the client, or why the rule should not be made absolute and he be attached for contempt of court. He denied that he had collected the money, but a verdict was rendered holding him liable, which on appeal was affirmed by the Supreme Court. An attempt was made to collect the money by process of law, which failed, and the attorney was subsequently arrested on attachment by the sheriff and lodged in jail. The contention that he was

being imprisoned for debt was not sustained, the court saying:

> Imprisonment under an indictment for contempt to compel obedience by an officer of court to a lawful order to pay over money which he has collected in the course of his official or professional duty, is not imprisonment for debt. It is sound disciplinary dealing with an unruly member of the forensic household. One who lives and moves within the precincts of the court misbehaves, to the injury of a person who has trusted him, and whose confidence he has abused, and the court orders him to make redress. He refuses, and the court, as the minister of the law, chastens him by imprisonment, and endeavors to coerce obedience. It is true he is a debtor; but he is more than a debtor—he is an assistant in the affairs of justice, and as such bears a peculiar and special relation to the law. Through that relation the court acts upon him, treating him, not as a mere debtor who will not pay, but as a domestic of the law who refuses to obey his master.

In *Jeffries* v. *Laurie* (27 Fed., 198), decided by Mr. Justice Brewer, it was held that an imprisonment for contempt in failing to obey an order to pay over money collected for a client, was not imprisonment for debt within the meaning of the constitution of Missouri, his honor saying:

> The punishment is not technically and simply for a disobedience of an order, standing by itself, for the payment of money. The

matter lies deeper than that. This proceeding is based upon the fact that counsel has collected money and failed to pay it over to his client, *and the order which was made for payment is simply an adjudication of the existence of the prior wrong.* If it had been shown that counsel collected money, had been robbed of it, or had lost it by means beyond his control, of course no peremptory order for payment would have been made. The fact that the order was passed is upon the idea that there had been prior misconduct in not paying over; *so this is not to be treated as an attempt to collect a debt by imprisonment, but as a summary proceeding resting wholly upon the fact of the professional misconduct of the attorney in collecting money belonging to his client and appropriating it to his own use.* The order was simply one step in the proceeding.

These cases, it is submitted, are in principle on all fours with the present case. In a contempt case the offender may secure relief from the imprisonment by a payment of his liability to his client; but if he fails to do so, he is imprisoned, *not for the debt, but because of his offense against the court.* So, in the case at bar, plaintiff in error may be relieved from the subsidiary imprisonment by paying ₱2,078.50 to Castle Brothers, Wolf & Sons; but if he fails to do so, he will be imprisoned, not for that indebtedness, but for the crime committed against the public in embezzling that sum.

In *State of Maryland* v. *Nicholson* (67 Md., 1) the validity of a statute was attacked on the ground that

the act "is in conflict with the constitution of this State, which abolishes imprisonment for debt." The language of the act was as follows:

> That if any collector shall willfully detain in his possession taxes collected by him and neglect to pay the same into the treasury of the State for more than sixty days after the day upon which it is made his duty to pay the same, or if no particular day be appointed, shall neglect to pay the same for the space of six months, he shall be deemed to be a defaulter, and upon conviction shall be imprisoned in the penitentiary, * * * unless the amount for which he is a defaulter be sooner paid.

In passing upon this question, the court said:

> There is a broad distinction, however, between imprisonment for debt within the meaning of the constitution *and imprisonment for a breach of duty on the part of a public officer, although such breach of duty may be the neglect or refusal on his part to pay money received by him for the use of the State.* Public officers were by the common law indictable for *malfeasance* or *misfeasance* in office, and although the constitution abolishes imprisonment for debt, this in no manner interferes with the power of the legislature to punish such offenses by imprisonment or otherwise, as the public interests may require.
>
> A collector of taxes is a *public officer*, whose duty it is to collect the taxes and pay the same into the treasury of the State, or to the parties entitled, and if he neglects to discharge this

> duty and appropriates to his own use the money thus received by him as collector, the legislature has the power to declare such acts of *commission or omission* to be an offense punishable in such manner as it may deem proper. Any other construction would deprive the legislature of all power to punish defaulting officials for the appropriation by them of money received and held in trust for the State. *Nor is it any objection to the statute that it provides, upon the payment of the money for which he is in default either before or after conviction, such collector shall be discharged, for the reason that the legislature has the right to prescribe the terms and conditions upon which the punishment shall be imposed.*

In *Harris* v. *Bridges* (57 Ga., 407) *habeas corpus* case, the petitioner Harris had been arrested in an action of trover for the recovery of personal property, sued out under the provisions of certain sections of the code. On the hearing he offered to prove his inability to produce the articles of personal property for which the action of trover was brought. This the court below refused to permit him to do and remanded him to jail. It was insisted in the Supreme Court of Georgia that the act in question and proceedings under it in which the petition was heard were in violation of the clause of the Constitution which provided that "there shall be no imprisonment for debt." In affirming the judgment of the court below, the Supreme Court said:

> The bail required in actions of trover for the recovery of personal property under the

provisions of that statute, and the proceedings authorized by it, can not, in any legal sense, be considered as an imprisonment for debt. If one man obtains the possession of the personal property of another by fraud or violence, or, having possession of it, and there is reason to apprehend that it will be eloigned or moved away or will not be forthcoming to answer the judgment that may be made in the case, there would seem to be no good reason why he should not be proceeded against and be required to comply with the terms of the statute made and provided for such cases; and if the defendant should be imprisoned, in accordance with the terms of the statute, on his failure to comply therewith he can not be said to have been imprisoned for *debt*. The theory of the statute is to prevent the taking possession of personal property by fraud or violence, and thereby prevent the true owner thereof from recovering it, and also to prevent a breach of the peace in attempting to do so, by requiring the defendant to enter into a recognizance, with security, for the forthcoming of the property to answer the judgment in the case, and if the defendant fails to give such security, then it is made the duty of the sheriff, or other lawful officer, to seize the property and deliver it over to the plaintiff, upon his entering into like recognizance, with security; and if the property is not to be found and can not be seized by the sheriff, or other lawful officer, the defendant shall be committed to jail, to be kept in safe and close custody, until the

> said personal property shall be produced, or until he shall enter into bond, with good security, for the eventual condemnation money.

In *State* v. *Wallin* (89 N. C., 570, 580) the court held that the costs which accrued on behalf of the State in a criminal prosecution and adjudged against the defendant, did not constitute a debt in the sense of that term as used in the Constitution which prohibited imprisonment for debt, but were in the nature of a penal infliction, punitory in character and purpose, as was the fine.

In re Ebenhack, petitioner (17 Kans., 618, 622), it was held, Mr. Justice Brewer delivering the opinion of the court, that under that clause of the Constitution which prohibited imprisonment "for debt, except in cases of fraud," the legislature had the power to provide that when, upon the trial of a misdemeanor, the jury should find the defendant not guilty, and also find that the prosecution was instituted from malice and without probable cause, the justice might adjudge the costs against the prosecuting witness, and if he failed to pay or give security for its payment, might commit him to the county jail until they were paid, the court saying:

> These costs are cast upon him as a penalty; they do not constitute strictly and simply a debt, in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery, is a debt.

In the matter of Albert Beall (26 Ohio St., 195) it was held that the provision of an act authorizing the

arrest on execution of a party against whom a fine had been adjudged, and his imprisonment until such fine should be paid or he be otherwise discharged according to law, was not unconstitutional, and that the provision applied to all cases where the party was adjudged to pay a fine, and was not confined to cases where the party was adjudged to stand imprisoned until the fine and costs were paid.

In accordance with the same principle are sections 6574 and 6575 of Shannon's Code of Tennessee, by the first of which it is provided that—

> If any person charged with the collection, safe-keeping, transfer, or disbursement of money or property belonging to the State or any county, use any part of said money or property by loan, investment, or otherwise, without authority of law, or convert any part thereof to his own use in any way whatever, he is guilty of embezzlement, and for every such act, upon conviction, shall be imprisoned in the penitentiary not less than five nor exceeding twenty years, and fined in a sum equal to the money embezzled, to be applied in satisfaction thereof.

And by the latter section it is provided:

> If such officer or person shall account for and pay over, according to law, all money, property, or other effects by him collected or received, he shall not be within the provisions of the preceding section.

Article 1, section 18, of the constitution of Tennessee, provides that—

> The legislature shall pass no law authorizing imprisonment for debt in civil cases—

but apparently the constitutionality of this law has never been questioned.

The case of *Carr* v. *State* (106 Ala., 35), which is especially relied upon by plaintiff in error, is not in conflict with the authorities above cited. The statute there under consideration made it a misdemeanor for a person engaged in banking to receive a deposit when the bank was insolvent, and provided that in case of conviction such person should be fined not less than double the amount of the deposit, one-half of which should go to the depositor, and that payment to him before conviction should be a defense to prosecution. In considering the policy and effect of the prohibition of imprisonment for debt, contained in the Constitution, the court said:

> It was to remove the evils incident to the system of taking the debtor's person upon a *capias ad satisfaciendum* that the organic inhibition came primarily to be ordained. But the effect of its ordination has been to establish a public policy much broader in its influence upon legislation and operation upon judicial proceedings than would have sufficed for the eradication of the ills which attended upon the recovery, or attempted recovery, of debts by restraint of the debtor's person. This policy is inimical alike to the incarceration of a debtor as a means of coercing payment, and

to his punishment by imprisonment for a failure to pay, at least when such failure results from inability. And hence it is that, while neither the letter of the inhibition, nor the broader policy which is engendered by it and has come to be a part of it, has any application to criminal judgments for fines and costs, *yet it is not within legislative competency to declare the mere nonperformance of a contract of indebtedness a misdemeanor, and punish the commission thereof by imprisonment, directly or indirectly;* for, as said in the notes to *State* v. *Brewer* (S. C.) (37 Am. St. Rep., 753, 758), "as that which is prohibited to be done directly can not be accomplished by indirection, the legislature can not declare the mere nonperformance of a contract to be a misdemeanor, for that would amount to an attempt to legalize imprisonment for debt." And so, in Tennessee, there was a statute which made it unlawful for any person, firm, corporation, etc., to refuse to cash any checks or scrip issued by them if presented to them within thirty days of the date of issuance, and declared that any such person, etc., so refusing to cash in lawful money such checks or scrip would be guilty of a misdemeanor, and upon conviction should be fined not less than $10 nor more than $25. The constitutional provision in that State is that the legislature shall pass no "law authorizing imprisonment for debt in civil cases," terms which would seem to allow greater latitude of legislation in respect of cases of the class we are considering than our own provision; and bringing the statute to the test

of this inhibition, the court said: "The act of the legislature in question, while not directly authorizing imprisonment for debt, does attempt to create a crime for the nonpayment of debts evidenced by checks, scrip, or order, and for such crime provides a penalty which may or may not be followed by imprisonment. In that way and for that reason the act is violative of the spirit if not the letter of the constitutional provision above cited. It is a direct imposition of imprisonment for the nonpayment of debt, and is therefore clearly within the constitutional inhibition." (*State* v. *Paint Rock Coal & C. Co.*, 92 Tenn., 81.)

And, after analyzing the statute, the court proceeded:

> It is a declaration of the baldest and most direct character to one party to a transaction, whereby he has incurred a debt to the other in the name of the State, that, unless he pays that debt, he shall be arrested, held to trial, tried, convicted, fined, and imprisoned at hard labor, *and this obviously not for any taint of criminality in the transaction out of which the debt arose, but purely and simply for the nonpayment of the debt.* For this default, and until it is purged either by simply paying the debt and accrued costs before conviction or by working out double the debt and the costs, the debtor may be imprisoned for an indefinite time before trial, merely and only because he does not pay the debt and expenses of putting this coercion upon him, there being no pretense even of ultimately punishing him for

> taking the deposit, if the preliminary imprisonment shall have the desired effect of extorting the money he owes the depositor out of him; and if, as is the case here, the compulsion of preliminary imprisonment fails of its intended effect, he may, under the guise of punishing an act *which was not criminal before this statute, and which upon the statutory definition does not necessarily involve abstract criminality or the taint of moral turpitude, and which might up to the very moment of conviction have been shorn of even its factitious criminality by the payment of a debt,* be held to hard labor until his services at the statutory rate shall yield the amount of the debt, and for an equally long time to work out a like sum imposed upon him as an additional penalty for his failure to pay the debt before conviction.

Therefore, the ground upon which the act under consideration was declared unconstitutional was that the alleged offense was in no sense criminal, and justified nothing more than a civil action; and that the provision in the constitution could not be evaded by declaring an act a crime which in fact involved no moral turpitude.

The cases decided by the Supreme Court of the Philippine Islands and cited by plaintiff in error, to wit, *United States* v. *Hutchins* (5 Phil., 343); *United States* v. *Lineses* (5 Phil., 631); *United States* v. *Glefonce* (5 Phil., 570); *United States* v. *Cortes* (7 Phil., 149); *United States* v. *Macasaet* (11 Phil., 447, 449), have no bearing upon the question here pre-

sented, as the decision in each case rested on the fact that under the statute applicable no subsidiary punishment was provided for.

II.

It was not error for the Supreme Court of the Philippine Islands to refuse to dismiss the cause without prejudice to the right to institute a civil action for the rendition of accounts.

There is no question that the conversion by plaintiff in error of the funds belonging to Castle Brothers, Wolf & Sons, was a criminal offense, and that regardless of the amount converted. Consequently, it was subject to the criminal jurisdiction of the courts of the Philippine Islands; and while the courts could very properly take cognizance of a civil action and pronounce judgment for the correct amount converted, yet the civil jurisdiction was not exclusive.

For the foregoing reasons it is insisted that the judgment of the Supreme Court of the Philippine Islands should be affirmed.

J. A. FOWLER,
Assistant Attorney-General.

APRIL, 1910.

O